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Chambers of Vincent L. Briccetti

1/21/20

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 1/21/20

-----X
NICHOLAS ALVAREZ,
 Petitioner,

v.

UNITED STATES OF AMERICA,
 Respondent.
-----X

ORDER

18 CV 177 (VB)
11 CR 169 (VB)

By letter dated January 16, 2020, petitioner Nicholas Alvarez, proceeding pro se, moves pursuant to Fed. R. Civ. P. 60(b)(6) to vacate the Court's Opinion and Order, dated January 14, 2019 (entered on the docket on January 15, 2019), which denied petitioner's motion for relief pursuant to 28 U.S.C. § 2255. (Doc. #20).¹

The motion is DENIED for the reasons set forth below.

Petitioner contends that (i) "[i]n a supplemental motion to the initial [Section 2255] motion filed, Petitioner argued that [trial] counsel additionally failed to offer any advice as to whether Petitioner should accept the plea offer," and (ii) the Court "did not expressly decide the claim regarding counsel's failure to offer any advice as to whether the plea should be accepted."

First, the Court is not aware of any such "supplemental motion," and the ECF docket does not reflect that any such supplemental motion was filed. In any event, what petitioner is now claiming is directly contrary to what he repeatedly argued in his 2255 motion; namely, that his attorney did give him advice as to whether to accept the plea offer and indeed specifically advised him not to accept the plea offer. (See Motion Under 28 U.S.C. § 2255 at 5 (Doc. #1); Petitioner's Brief and Memorandum of Law in Support at 14-15 (Doc. #2); Petitioner's Reply Brief at 9 (Doc. #19)). In its Opinion and Order, the Court concluded that trial counsel was not constitutionally ineffective both because the Court accepted as true counsel's sworn statement that he discussed the plea offer with petitioner and petitioner rejected the offer out of hand, and because petitioner did not establish prejudice. (Doc. #20 at 11-13). Nothing in petitioner's recent letter gives the Court any reason to re-visit its prior ruling.

Moreover, the instant motion is untimely. Rule 60(c) requires that a Rule 60(b)(6) motion be made within a reasonable time. This Court's Opinion and Order was entered on the docket on January 15, 2019, more than a year prior to when petitioner submitted the instant letter-motion on January 16, 2020. Petitioner acknowledges that the information in the letter-motion was available to him prior to the issuance of the Opinion and Order, and thus was also available to him after the issuance of the Opinion and Order. Yet, petitioner waited until after the Second Circuit, on January 2, 2020, denied his motion for a certificate of appealability and dismissed his appeal because he had not made a substantial showing of the denial of a constitutional right (Alvarez v. United States, Dkt. No. 19-413 (Doc. #34)), to submit the instant

¹ The documents referenced herein are in the ECF docket in case no. 18-cv-177.

letter-motion. In short, the letter-motion was not made within a reasonable time after the entry of this Court's Opinion and Order. Instead, it was apparently made only in response to the Second Circuit's recent action as a desperate, last-ditch attempt to set aside petitioner's conviction and sentence.

Petitioner was not denied effective assistance of counsel, his 2255 petition was properly denied, and his Rule 60(b) motion is both untimely and without merit.

Petitioner's motion pursuant to Fed. R. Civ. P. 60(b) is DENIED.

The Court certifies pursuant to 28 U.S.C. § 1915(a)(3) that any appeal from this order would not be taken in good faith, and therefore in forma pauperis status is denied for the purpose of an appeal. See Coppedge v. United States, 369 U.S. 438, 444-45 (1962).

The Clerk is instructed to mail a copy of this Order to petitioner at the following address:

Nicholas Alvarez
Reg. No. 64636-054
FCI Gilmer
P.O. Box 6000
Glenville, WV 26351

Dated: January 21, 2020
White Plains, NY

SO ORDERED:

A handwritten signature in black ink, appearing to read 'Vincent L. Briccetti', written over a horizontal line.

Vincent L. Briccetti
United States District Judge